

The Privatization of Human Rights Violations – Business Impunity or Corporate Responsibility? The case of human rights abuses and torture in Iraq.

By Nils Rosemann

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I Introduction

In his first report on the protection of civilians in armed conflict, Kofi Anan called on Member States and non-State actors to adhere to international human rights and refugee laws, particularly the rights enumerated in Article 4 of the International Covenant on Civil and Political Rights, such as the right to life and the prohibition of torture.¹ Furthermore, he emphasized in his second report that “*international instruments require not only Governments but also armed groups [...] to take measures to ensure the basic needs and protection of civilian populations.*”² Contrary to this normative demand for human rights compliance by private actors, Major General Antonio M. Taguba remarked within his secret report on mistreatment of prisoners in U.S. custodies and prisons, that employees of private military firms, contracted by the U.S. led Coalition Provisional Authority for interrogation “*were either directly or indirectly responsible for the abuse at Abu Ghraib.*”³ On June 6, 2004 the the Center for Constitutional Rights and the Philadelphia law firm of Montgomery, McCracken, Walker and Rhoads filed a class action claim against U.S. corporations and their employees for conspiring with U.S. officials to humiliate, torture and abuse persons detained at Abu Ghraib.⁴

Shortly after the release of the report by *The New Yorker* on April 30, 2004⁵, it became clear that this maltreatment of prisoners had a certain structure, pattern and goals. Existing commentary focuses on the interrogation methods by state actors, such as Military Intelligence, Military Police and Armed Forces of the U.S. led occupational forces. Instead, this article focuses on non-state actors – primarily, private contractors and their employees. In order to discuss responsibilities for human rights’ abuses by corporations, this article will focus on the involvement of private military and security corporations in the armed foreign policy of the U.S. in general and in the war on Iraq in particular. Underlying structures will be examined and I will highlight the loophole created to escape national and international law. In

¹ Recommendation 2 of Report S/1999/957, U.N. Doc. S/1999/957; Article 4, 6, 7 of International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966; entered into force on March 23, 1976; U.N. Doc. A/RES/2200 A (XXI);

² Paragraph 7 of Report S/2001/331, U.N. Doc. S/2001/331

³ Major General Antonio M. Taguba: Article 15-6 Investigation at the 800th Military Police Brigade, hereinafter referred as ‘Tagubas Report’ (available at <http://www.globalpolicy.org/security/issues/iraq/attack/law/2004/2004tagubareport.pdf>), page 48

⁴ Class Action of SAMI ABBAS AL RAWI, et al. (Plaintiffs) v. TITAN CORPORATION; CACI INTERNATIONAL INC. et. al. in the United States District Court for the Southern District of California, San Diego (available at <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=TutDBqRhAY&Content=387>)

⁵ Hersh, Seymour M: Torture at Abu Ghraib, in *New Yorker*, April 30, 2004 (available at <http://www.globalpolicy.org/security/issues/iraq/attack/law/2004/0430torture.htm>)

order to hold corporations accountable, this article will conclude with a proposal for Corporate Responsibility based on general human rights principles.

II Torture in Iraq

The torture at Abu Ghraib is indicative of the U.S.'s overall conduct in recent armed conflicts. In order to train soldiers to kill, a certain picture or caricature of the enemy has to be constructed, by which the enemy loses any characteristic as a human being. Pictorial messages on bombs and the use of civilian targets in the recent wars against Serbia, Taliban and Iraq in conjunction with pictures of celebrating and laughing soldiers shows that many U.S. soldiers deny their targets any human capacity. By degrading the target to a sub-human level, the perpetrator is able to mentally apply other standards far removed from the notion of human rights. If this applies in the case of killing within combat it will surely continue when soldiers are exercising executive and legal powers such as investigation, interrogation and safeguarding prisons.

In addition, after September 11, 2001, long lasting attempts to throw off the burden of human rights in interrogations were successful and the C.I.A., the Pentagon and the White House drafted guidelines for more aggressive interrogation practices.⁶ The promotion of Major General Geoffrey Miller from commander of the task force in charge of the prison at Guantánamo to head of prison operations in Iraq exhibits not only political continuity, but also career continuity at the personal level. Political objectives and personal continuity are the reason that the patterns in Guantánamo Bay, Afghan prisons and Abu Ghraib are the same. Brutality against detainees has become an institutionalised feature of U.S. wars as well as a pleasure to document and sell on the black market by military personnel.⁷

The first report of investigation and interrogation by Major General Donald J. Ryder, submitted on November 05, 2003, concluded that in Abu Ghraib there were human-rights, training and manpower issues of a system-wide magnitude which needed immediate attention. The main concerns were about the involvement of Military Police in intelligence operatives.

⁶ See: Justice Department's Office of Legal Counsel: Memorandum "Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A" of August 1, 2002; Defense Department: Working group on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations convened by Defense Secretary Donald H. Rumsfeld of March 6, 2003

⁷ Rose, David and Hinsliff, Gaby: Abuse by guards filmed at Camp Delta - Videos of brutal attacks were stored and catalogued in: *The Guradian Weekly* of May 20, 2004, page 4

Because of ongoing complaints by the International Federation of the Red Cross and Non-Governmental Organisations⁸ and in order to conclude the internal investigations, Lieutenant General Ricardo S. Sanchez, Commander of Combined Joint Task Force Seven requested (on January 19, 2004) of the U.S. Central Command to appoint an Investigating Officer, who eventually became Major General Antonio M. Taguba. Taguba reveals in his report in February 2004 that soldiers of the 372nd Military Police Company, 800th Military Police Brigade and members of the U.S. intelligence community, engaged in a “*systematic and illegal abuse of detainees*”. Furthermore, the report claims numerous instances of “*sadistic, blatant, and wanton criminal abuses*” at Abu Ghraib prison between October and December 2003. Reports conducted later by James R. Schlesinger⁹ and Major General George R. Fay¹⁰ focused, respectively, on the failures in the chain of command and on specific violations of human rights.

1 Interrogation and torture in Iraq as a private business

Taguba reports that Military Police guards were directed and actively requested by army intelligence officers, C.I.A. agents, and private contractors “*to set physical and mental conditions for favourable interrogation of witnesses*”¹¹ – an euphemism for breaking the will of prisoners.¹² Interestingly, it had not been the treatment of the prisoners as such that caused the investigation, but the involvement of Military Police because such “*actions generally run counter to the smooth operation of a detention facility, attempting to maintain its population in a compliant and docile state.*”¹³ An obverse conclusion could be that everything would have been acceptable if it was not the Military Police, but Military Intelligence and private sub-contractors who carried out the torture of detainees. The report states clearly that this is not the case. Taguba recommends relieve of duty and non-judicial punishment of persons in charge for Military Intelligence. Furthermore, the report recommends immediate disciplinary action of the private employees of CACI International Inc. involved in the torture.¹⁴ But confronted with the allegations CACI International Inc. stated that the company doesn't know

⁸ Such as for instance Amnesty International, in a November 14, 2003 briefing, cited “persistent reports and rumours of detainees being secretly ‘rendered’ to countries with a record of abusing suspects in order to extract information.” Amnesty further reported that “Officials ...have openly stated that the USA may deliberately send some detainees to countries where they are abused during interrogation.”

⁹ Final Report of the Independent Panel to Review DoD Operations, Chaired by James R. Schlesinger, August 2004, available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>

¹⁰ AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade by Major General George R. Fay, August 2004, available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>

¹¹ Tagubas Report, page 9, 11, 12, 26, 48, see footnote 3

¹² Hersh, Seymour M, see footnote 5

¹³ Tagubas Report, page 11, see footnote 3

what its employees are being accused of in Iraq.¹⁵ In other words, they admitted that they were just “doing their job,” one worth about \$ 66.2 million.

Within Taguba’s report it is stated, that in general, personnel of military and security corporations (such as Titan Corporation and CACI International Inc.) did not appear to be properly supervised.¹⁶ In addition, Schlesinger’s report concluded that approximately 35 percent of private interrogation personnel were not properly trained and due to insufficient oversight, contractors believed that the techniques were condoned.¹⁷ This conclusion is shared by a former military intelligence officer at Guantánamo Bay, who is now working as a private contractor at Abu Gharib. He blamed the abuses on a failure of command in U.S. Military Intelligence and an over-reliance on private firms.¹⁸

The reason for this can be found in the contracting business policy in which there are no clear guidelines for engagement with existing private military and security forces where draft general procurement contracts are in use. CACI International Inc.’s engagement in Iraq for instance is based on a pre-existing General Service Administration Contract between the National Business Centre. This is a fee-for-service procurement operation of the Interior Department on behalf of Combined joint Task Force 7 and Premier Technology Group Inc. The latter was bought by CACI in order to obtain its expertise and influence in intelligence and military operations. These general contracts are lacking any reference to human rights and ironically even decisions from the public side are going back to business advice, since the Pentagon hired corporations such as Military Professional Resources Inc. to draft guidelines for public-private engagement. Military Professional Resources Inc. produced Field Manual 100-21, better known as “Contractors in the Battlefield” which “*established a doctrinal basis directed toward acquiring and managing contractors as an additional resource in support of the full range of military operations,*”¹⁹

In addition, the structure of employee selection causes a high probability of human rights abuses by military and security corporations. Blackwater Security Consulting – not mentioned in the Abu Ghraib scandal – employs, among others, 60 Chilean ex-commandos who were

¹⁴ Tagubas Report, page 48, see footnote 3

¹⁵ See Jeffrey Elefante, executive vice president and general counsel at CACI in an interview with Jonathan Groner, in Groner, Jonathan: Untested Law Key in Iraqi Abuse Scandal, Legal Times May 11, 2004 (available at <http://www.law.com>)

¹⁶ Tagubas Report, page 30, see footnote 3

¹⁷ Schlesingers Report, page 68, see footnote 9

¹⁸ Conachy, James: Private military companies in Iraq: profiting from colonialism, in: World Socialist Web Site, May 03, 2004 (available at <http://www.wsws.org/articles/2004/may2004/pmcs-m03.shtml>)

¹⁹ Defense Ministry: Field Manual 100-21 (available at <http://www.publicintegrity.org/wow/docs/ContractorsBattlefield.pdf>)

trained under the Pinochet dictatorship. A former South African judge, Richard Goldstein, told the press he knew of 150 former apartheid-era security operatives working as mercenaries in Iraq.²⁰ Finally, the U.S. demand of private security forces exceeds the amount of properly trained personnel. In order not to miss a profit, security firms send "*cooks and truck drivers*" to work as interrogators and this group of personnel are lacking any specific training and guidance.²¹

2 The wider perspective: Private Security Firms in Iraq

However, interrogations by private military and security corporations are just the tip of the iceberg, according to officials of the U.S.-led Coalition Provisional Authority there are about 20,000 private security contractors in Iraq, including Americans, Iraqis and other foreigners.²² An investigation by *The Guardian* estimates that private contractors are the second largest contingent of armed forces in Iraq.²³ Other sources estimate that private military and security contractors are contributing as much as 20 percent to the total U.S.-led occupation force. At least 35 of such corporations employ at least 5,000 heavily-armed foreign mercenaries and over 20,000 Iraqis to carry out explicitly military work in some of the most dangerous areas of the country. Another estimated 10,000 to 15,000 foreigners are performing vital military logistical support roles such as driving, maintenance, training, communications and intelligence-gathering.²⁴

The reliance of the Coalition Provisional Authority on private military and security corporations explains the example of Blackwater Security Consulting that even provides personal security to U.S. administrator L. Paul Bremer. This detail illustrates the extent to which the military is breaking new ground and how the U.S. government has turned increasingly to private firms. The daily picture in Iraq is that of military and security contractors, without uniforms or standardised identification, driving through the streets in unmarked vehicles, manning roadblocks or stalking outside buildings with machine-guns. This has become an ubiquitous and offensive symbol of the U.S. occupation.

But private corporations become targets too, as killings and kidnappings show. Prime examples of this are: the death of a man employed by the London-based Hart Group Ltd. in

²⁰ Conachy, James, see footnote 18

²¹ Berger, Julian: *Cooks used as interrogators*, in: Washington Post, The Guardian Weekly Vol. 170, No. 21 (2004, May 13-19), page 5

²² Priest, Dana and Flaherty, Mary Pat: *The Security Firms - Under Fire*, Security Firms Form An Alliance, in: Washington Post, April 8, 2004; Page A01

²³ Traynor, Ian: *The Privatization of War*, in: The Guardian, December 10, 2003 (available at <http://www.globalpolicy.org/security/peacekpg/training/1210privatization.htm>)

Kut, who had been pinned down on the rooftop of the house he and four colleagues had been occupying; attacks on employees of Control Risk Group and Triple Canopy and finally the killing and mutilation of four employees of Blackwater Security Consulting – all former members of U.S. Special Forces, working on a contract to protect a private food company in Iraq – in *Fallujah*.²⁵

III Private Military Companies: A world wide business

Again, what is happening in Iraq is just another piece in the jigsaw that is the global picture of privatization and outsourcing of security. In a world of actual, supposed and constructed threats, security becomes the main concern of people. But neo-Liberal thoughts lead to the conclusion that States cannot and should not provide security. What was historically the core concept of the Leviathan-like States has now been privatized. Now, this seat-of-the-pants mercenary business has become a \$100 billion dollar global operation (with the U.S. government as its largest employer) and "hired guns" and "rent-a-cops" are now the business of world wide acting firms. In a mission statement, CACI International Inc – a U.S. company involved in the human rights violations at Abu Ghraib – describes its profile as: “*CACI International Inc provides the IT and network solutions needed to prevail in today's new era of defence, intelligence and e-government. [...] Our solutions lead the transformation of defence and intelligence, assure homeland security, enhance decision-making and help governments to work smarter, faster and more responsively.*”²⁶

Cases of hired armed forces were rare until the mid 1990's. Well known examples are the Angolan and Sierra Leone governments in hiring mercenaries, whereas relatively unknown cases are NGOs, Humanitarian Aide Workers or United Nations Agencies hiring armed forces to provide security and logistical support. The turning point came with the wars on the Balkans where British, U.S. and South African security firms started to meet the demands of unequipped and unprepared political, military and humanitarian missions.²⁷

For these military and security corporations Iraq is just another market. Very often human rights abuses in one State are not disqualifying a corporation from acting in another state,

²⁴ Conachy, James, see footnote 18

²⁵ Priest, Dana and Flaherty, Mary Pat, see footnote 22

²⁶ available at <http://www.caci.com/about/profile.shtml>

²⁷ Singer, Peter W.: *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell Studies in Security Affairs), Cornell University Press, 2004

because the responsibility of the corporation as a legal entity does not exist. Dyncorp, for example, a Pentagon favourite, has a contract worth tens of millions of dollars to train an Iraqi police force. It also won the contract to train the Bosnian police, but was implicated in a grim sex slavery scandal, with its employees accused of rape and the buying and selling of girls as young as 12. A number of employees were fired, but never prosecuted. An U.N. official in Sarajevo said, that "*Dyncorp should never have been awarded the Iraqi police contract.*"²⁸ **Thus the absolution of responsibility causes the absence of institutional memory.** The following sections will focus on a few general observations about reasons for this obedience to the idea of private military and security forces.

1 Corporate and personal profit as reason for outsourcing

Outsourcing makes a former state-owned service a tool for business. The U.S. army estimates that of the \$87 billion earmarked this year for the broader Iraqi campaign, including central Asia and Afghanistan, one third of that, nearly \$30 billion, will be spent on contracts to private companies.²⁹ Other sources estimate that private military companies earn about \$100 billion yearly in government contracts.³⁰ For instance, in Iraq there was a \$3 million contract with Kellogg, Brown & Root (a Halliburton subdivision) for the construction of tents and the employment of Bangladeshi and Indian cooks who feed 4.000 troops daily.³¹ Ironically, the soldiers who were hired and trained as cooks and drivers are now sent to patrol Baghdad or serve as prison guards. Like their contemporary colleagues from private military and security firms they are neither skilled nor well trained for these duties.

In conjunction with this ideological neo-Liberal reason for outsourcing military and security services to private corporations, another reason for this phenomenon is the significant difference in remuneration. Many well-educated and trained security specialists move to the private sector considering that they can earn up to \$1,000 per day as private contractors. Thus, well-skilled army members set up their own business and consequently, some Coalition Forces become lacking in required personnel. According to an official of the Coalition

²⁸ Traynor, Ian, see footnote 23

²⁹ Traynor, Ian, see footnote 23

³⁰ Krane, Jim: Private Firms Do US Military's Work, Associated Press, October 29, 2003 (available at <http://www.globalpolicy.org/security/peacekpg/training/1029private.htm>)

³¹ Krane, Jim, see footnote 30

Provisional Authority, the U.S. military does not have enough specially trained troops or Iraqi police officers to guard its civilian employees.³²

2 Subcontracting security and hiding the real costs of War

Another reason for being so absorbed in the idea of private involvement in previously state-owned duties are the lower military budgets confronted with new threats and security demands. Since the end of the cold war it is estimated that six million servicemen have been thrown on to the employment market. The US military is 60 percent the size of a decade ago and the Soviet collapse wrecked the colossal Red Army and melted few of the allied armies away. Finally, the end of South American Dictatorships and the end of apartheid destroyed a lot of questionable carriers of people with little to sell but their fighting, military and interrogational skills. The booming private sector has soaked up much of this manpower and expertise. It is this kind of "downsizing" that has fed the growth of the military private sector.³³ And as a result, a government such as the U.S. government increasingly turns to private firms due to a lack in interrogational resources within the army.³⁴

The private investors and companies contracted to rebuild Iraq are spending an estimated 10 percent to 15 percent of their money to secure workers and projects. The figure could climb to 25 percent if the unrest continues.³⁵ Until now, government-handled risks like security, transportation, food and lodging are increasingly pushed to be borne by private contractors. Still, contracts are mainly open to negotiation, but after the pictures of killed and mutilated private security contractors in *Fallujah* the Pentagon proposed an amendment to general Department of Defence acquisition rules which would require private contractors to take over any risk in general. Interestingly, the discussed proposal also includes the precedence of military commands over terms of the existing contract in exchange for the right to charge for these additional services.³⁶

Finally, in addition to the money spent by U.S. Government, the Coalition Provisional Authority awarded (in the first 14 months of occupation) \$ 2.26 billion of Iraqi money to

³² Priest, Dana and Flaherty, Mary Pat, see footnote 22

³³ Singer, Peter W., see footnote 27

³⁴ Schlesingers Report, page 63, 67, see footnote 9; Fay Report, page 33, see footnote 10

³⁵ U.S. Relying on Private Security in Iraq, The Associated Press, April 27, 2004

³⁶ Blum, Vanessa: DOD's New War Zone Rules for Contractors, in Legal Times of April 22, 2004 (available at <http://www.law.com>)

almost 2,000 different contractors. At least 85 percent – \$ 1.9 – went to U.S. corporations.³⁷ Together, this money is nothing other than cross subsidies from the U.S. budget and the Iraqi people to the costs of the war via private contractors.

3 Private Military Companies – playground for misuse of power and influence

The real amount of money that is given directly or via the “Oil for Food Program” to private contractors is still not declared in a transparent manner. Speculations and information because of investigative journalism are no more than examples, which surely show only a small percentage. For instance, the aforementioned \$3 million contract with Kellogg, Brown & Root. (Interestingly, Halliburton the corporate parent of Kellogg, Brown & Root was formerly headed by Vice President Dick Cheney.)³⁸ But the handed out money returns to the politicians, like estimated features by Iraq contractors DynCorp, Bechtel and Halliburton are showing. According to the Centre for Responsive Politics **these corporations donated more than \$2.2 million - mainly to Republican causes** like the 2000 Bush presidential campaign - between 1999 and 2002.³⁹ Security and military corporations like Blackwater Security Consultant and CACI International Inc. and Titan’s PAC for example, has contributed a dozen times more money to Republicans than to Democrats during the 2004 election cycle: Until Spring 2004 Titan spent approximately \$182,000 on Republican committees and candidates, Democrats have received a mere \$15,000 from Titan.⁴⁰

4 Training too expensive – The case of highly sophisticated military equipment

Furthermore, the reliance on military and security corporations fits into the bigger picture of the necessary involvement of civilians in military operations. Modern weapons are very sophisticated and their use needs intensive training. **When the unmanned Predator drones, the Global Hawks, and the B-2 stealth bombers go into action, their weapons systems, too, are operated and maintained by non-military personnel working for private**

³⁷ Cha, Ariana Eunjung: \$1.9 Billion of Iraq's Money Goes to US Contractors, in Washington Post of August 4, 2004

³⁸ Krane, Jim, see footnote 30

³⁹ Krane, Jim, see footnote 30

⁴⁰ Schlesinger, Robert: The private contractor-GOP gravy train (available at http://www.salon.com/news/feature/2004/05/11/private/index_np.html)

companies. It is a logical continuation that private military corporations now do other jobs on the ground.

III The legal framework

After business has become a highly influential international actor and private military and security corporations gained more and more influence and impact on human rights, the question for this chapter is how law is framing this development. As with any other framework for interaction, whether social, economical or political, law is a construct that serves the majority to legally exercise and secure its power. The power is used legitimately if normative standards are observed and actors are accountable. The shift of security duties from public authorities to private contractors can be seen as an attempt to escape responsibility, if the gained power is not shaped by any system of accountability. In the following sections it will be shown, that impunity is another goal intended by the private engagement in Iraq.

1 Attempts to secure impunity for a dirty war

Besides economic reasons within the security and military market, there are political motivations for outsourcing military tasks to private contractors, notwithstanding that these political reasons are means of economic interests. One of these political inspirations is the idea of impunity.

In order to torture in Guantánamo Bay, the U.S. tried to create a non-legal, non-territorial zone, free of international law. By introducing a formerly unknown type of unlawful combatant, the U.S. is claiming that International Humanitarian Law, which protects prisoners of war, is not applicable. This lack of clarity and the silence of the world helped to remove responsibility in the past. It is still unclear how the recent ruling by the U.S. Supreme Court, which entitles prisoners to challenge their detention in U.S. courts, will alter this situation. Nevertheless, the creation of a no-man's-land between law and practice will cause difficulties in finding the track back to a legal and legitimate use of power.

With Guantánamo as a rehearsal, there came another legal loophole this time in Iraq. There, detainees are either members of the armed force of the conflicting party or criminals or criminalized civilians, to whom International Humanitarian Law is applicable. In order to

escape the framework of international law again, certain duties are shifted to military and security corporations such as governing and protecting prisons as well as the interrogations. By this, private companies were able to do things that government forces found unacceptable, such as torture in Abu Gharib. Taguba's report clearly explained that the torture was requested and guided by interrogators and translators employed by private corporations, such as CACI International Inc. What the report hides is that many of these contractors are former interrogators of the U.S. army and intelligence in Guantánamo Bay and Afghanistan. In addition, the report keeps silent the torture by private corporations where no military involvement was obvious, for example the unmentioned accusation of the raping of a young man is only one case.⁴¹ The reason for keeping eyes closed is that private contractors are not under military order and with the interpretation of existing rules by the occupying Coalition Forces private military corporations cannot be examined by the military inspection.⁴²

Interestingly, the deal between corporations and States is as old as business itself. One famous example of granted impunity is the awarded freedom from legal liability of Sir Francis Drake's explorations with *The Golden Hind* in 1580 by Queen Elizabeth I., who was at the same time the largest shareholder. Similarities of relationships between U.S. administration and business are unintended but obvious. Keeping in mind that this 1580 exploration led to the foundation of the East Indian Company in December 31, 1600, ruling a Sub-Continent for more than 200 years, one has to hope that history does not repeat itself.

Finally, transferring certain conduct and duties to private contractors enables the U.S. Government, to wage wars by proxy and without the kind of congressional and media oversight to which conventional deployments are subject. Via engaging private military companies for ensuring economic and political objectives the new wars are outside political accountability.

2 Applicable National Law of the State of Activity

In order to prosecute human rights abuses committed by corporations in general and by military and security personnel the first examination has to take part within the domestic law of the state of activity (*lex loci actus*).

On June 5, 2003 the U.S. led Coalition Provisional Authority enacted Order 10 by which it took charge of all prisons and detention centres in Iraq. In Memorandum 2 of June 8, 2003 the

⁴¹ Conachy, James, see footnote 18

Coalition Provisional Authority defines the treatment of detained people, explicitly it only outlaws corporal punishment, punishment by placement in a dark cell, and all cruel, inhuman or degrading punishments as punishments for disciplinary offences.⁴³ Furthermore, with Order 7 of June 10, 2003 a general impunity was given to persons that aid, assist or associate themselves or work for the Coalition Forces or the Coalition Provisional Authority.⁴⁴

Finally, a few weeks later, on June 27, 2003 Order 17 was passed which granted any foreign contractor or sub-contractor and employees of such contractors of the Coalition Forces or the Coalition Provisional Forces impunity for their official activities pursuant to the terms and conditions of the contracts and states that such contractors shall not be subject to Iraqi laws or regulations.⁴⁵

3 Applicable National Law of the State of Origin

Since the Coalition Provisional Authority granted impunity to military and security corporations under Iraqi jurisdiction, the second jurisdiction that might be able to address human rights abuses by corporations in Iraq is the one of the origin of military corporations (*lex domicilii*).

a Uniform Code of Military Justice

The Uniform Code of Military Justice outlaws violations of human rights, such as torture, by members of the official armed forces, but this law is seen as not applicable to private military and security corporations even if they work alongside active duty service members. Until the proposed general contractual inclusion of Uniform Code of Military Justice is **not** approved or included in any singular contract, the privatisation of military and security duties won't be compensated with the same responsibility in private law.

b Military Extraterritorial Jurisdiction Act

Although the Military Extraterritorial Jurisdiction Act of 2000⁴⁶ creates jurisdiction over crimes committed abroad, this law is narrowly crafted and may not cover some of the abuses at Abu Ghraib. Under this act the Justice Department is permitted to go into U.S. district

⁴² Chapter 47, Section 802, Article 2 of United States Code

⁴³ Article 8, Section 11 of Memorandum 2 of June 8, 2003

⁴⁴ Section 3, Article 3 of Order 7 of June 10, 2003

⁴⁵ Section 3 of Order 17 of June 27, 2003

⁴⁶ Military External Jurisdiction Act of November 22, 2000

courts to prosecute employees of contractors and subcontractors who committed crimes on foreign soil. But this could only happen if the committed crime would be punishable within the U.S. with a minimum one year imprisonment and if the contract was made with the Armed Forces. The escape for both contractors under this law is the ambiguity of the crimes committed, that the law is not applicable if, for instance, C.I.A. or other intelligence is the contractor of private interrogators and that the Department of Defence does not have the infrastructure to investigate abroad. What is committed behind closed doors does not become visible for the bureaucrats in Washington D.C. Furthermore, the few investigated cases are showing that the humiliation of detainees or stripping them naked is not as clearly addressed as a federal offence. The two dead Iraqis, who died after being questioned by the C.I.A. contracted interrogators, are not an issue for the Department of Defence.⁴⁷

c Torture

Torture can be punished in U.S. courts by up to 20 years in prison and torture resulting in death of the victim is a federal capital crime since the U.S. signed the International Convention Against Torture and outlawed torture committed by U.S. citizens outside the United States. Torture is defined in federal law as actions taken "*under the colour of law*" that are "*specifically intended to inflict severe physical or mental pain or suffering [...] upon another person who is within the custody or control of the torturer.*" There can be no question that the degrading and disgusting behaviour that the world witnessed in Abu Ghraib is a clear example of torture.

But again the loophole for both contractors is a narrow understanding of human rights violations in general and of domestic law against torture in particular. Under this perception a human rights violation, such as torture, can only be committed by public officials. Anything else, causing the same violations of the dignity of the victim, but committed by a private contractor, is a 'normal crime', but not torture. Although the Nuremberg Trials had shown that industry and individuals were part of the military chain of command and therefore accountable, the modern privatization of human rights violations slights international law.

⁴⁷ Groner, Jonathan, see footnote 15

d President Executive Order No. 13303

Although the examples of non-applicable law have shown the widely granted impunity for private military contractors, this was not seen as sufficient enough for corporate demands of risk management. Therefore, right after the beginning of the war against Iraq, the U.S. Presidency passed Executive Order 13303 on May 22, 2003; this granted contractors and sub-contractors of the U.S appropriation of the Iraqi Oil business, any impunity for crimes under U.S. jurisdiction.⁴⁸ One has only to imagine that torture and other inhuman treatment in Iraq is done by security corporations, which are subcontracted by oil business and which have the aim to combat crimes against U.S.-Iraqi Oil business *and* that impunity will be the result again.

e Civil Liability

As observed, criminal accountability for offences in Iraq committed by military and security corporations will be hard to find, however, one has to state that at least under civil and tort law compensation can be sought.

The American Tort Claims Act provides U.S. District Courts with jurisdiction for any civil action by an alien for a tort only, committed in violation of the law of the Nations or a treaty of the U.S.⁴⁹ **The American Tort Claims Act is the only general judicial remedy available for mass and systematic violations such as genocide and crimes against humanity, as well as for war crimes, slavery, arbitrary detention, religious persecution, and other egregious atrocities.** More specific is the Torture Victim Protection Act⁵⁰ that gives similar rights to U.S. citizens and non-citizens alike to bring forward claims for torture and extrajudicial killing. Under both laws, the perpetrator must be physically served with the lawsuit in the United States in order for the court to have jurisdiction.

4 The applicable International Law

As difficult as on a domestic level is the search for justice for victims of human rights violations on the international level. Still, the promise of the Charter of the United Nations to secure human rights as a precondition for peace and freedom is far from being fulfilled.

⁴⁸ Executive Order No. 13303 of May 22, 2003

⁴⁹ American Tort Statute of 1792, 28 U.S.C. 1350

⁵⁰ Torture Victim Protection Act of May 12, 1992, 28 U.S.C. 1350

a General Principles of Humanitarian Law

Since human rights abuses by military and security corporations in Iraq were committed in times of war, the first examination has to be done under the special provisions of the Humanitarian Law, namely the Geneva Conventions. Obviously, the use of mercenaries is outlawed by the Geneva conventions, but the legal status of contractors falls into an international grey zone. Military and security corporations do not fit the legal definition of mercenaries, because that definition requires that they work for a foreign government in a war zone, in which their own country is not part of the fight. Furthermore, armed contractors are not "non-combatants" with the duties and protection of the 4th Geneva Convention because they carry weapons and act on behalf of the U.S. government.⁵¹ Finally, they are also not "lawful combatants" under the 3rd Geneva Convention, because they don't wear uniforms or answer to a military command hierarchy. From a legal point of view, these private contractors fall into the same grey area as the unlawful combatants detained at Guantánamo Bay. On the one side they are not bound by the standards of Humanitarian Law and on the other ironic side they are not protected by the Humanitarian Law either.

b General Human Rights Law

International human rights law sets standards and norms that have to be first of all implemented at the national level. As outlined above, these domestic implementations fail to criminalize corporate human rights abuses. Human rights law is dealing with the relationship between states and people under their jurisdiction by setting norms and standards for this relationship. As a result of these international efforts, human rights protection can be seen as the institutionalization and codification of three obligations: the obligation to respect, protect and fulfil human rights.⁵²

Human rights law further sets principles for the relationship among states, since human rights violations of a certain value are a threat to peace which enables the Security Council to respond under Chapter VII of the Charter of the United Nations. Furthermore, human rights

⁵¹ Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted on August 12, 1949 and entered into force on October 21, 1950

⁵² See as theoretical background for many General Comments of treaty bodies: Eide, Asbjørn: Realization of Social and Economic Rights an the Minimum Threshold Approach, in: Richard., Pierre Claude / Burns, H. Weston (Eds.): Human Rights in the World Community. Issues and Action, Philadelphia 1992, p. 158f. (159)

law defines the relationship between nations because *jus cogens* norms of human rights law – such as for instance the prohibition of genocide, racial discrimination, slavery or torture – are applicable *erga omnes*. In addition “*gross and reliably attested violations of human rights and fundamental freedoms which appear to reveal a consistent pattern*”⁵³ lead to the consideration of these violations within the Charter-based human rights protection mechanism, namely the Commission on Human Rights.

Finally, human rights law defines the relationship between individuals by obliging them to mutually respect the human rights of the other. The notion that lays behind this recognition of direct human rights obligations of non-state actors is that although States are the single creator of international law they are not the only subject and object of international relations, nor of international law. With regard to corporate impact on human rights alongside with states’ obligation for indirect human rights protection, corporations have the direct obligation to respect the human rights of others as well as to contribute to the protection and fulfilment of human rights within their respective spheres of influence. Arising from Article 29 of the Universal Declaration on Human Rights⁵⁴, which stated that “[*everyone*] has duties to the community in which alone the free and full development of his personality is possible”, these were first of all thought as moral duties⁵⁵. A major shift came with the codification of international human rights law. Both Preambles of the Covenants on Civil and Political Rights as well as on Economic, Social and Cultural Rights “[*realized*] that the individual, having duties to other individuals and to the community to which he belongs...is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.”⁵⁶ These responsibilities are addressed within numerous authoritative interpretations by both treaty committees.⁵⁷ Furthermore, recent developments – such as both Optional Protocols of the International Convention on the Rights of the Child – address direct obligations of non-state actors with regard to child soldiers⁵⁸ as well as child pornography and sexual exploitation.⁵⁹

⁵³ See ECOSOC Resolution 1235 (XLII) of June 6, 1967, ECOSOC Resolution 1503 (XLVIII) of May 27, 1970, ECOSOC Resolution 2003/3 of June 16, 2000

⁵⁴ Universal Declaration of Human Rights, adopted by General Assembly Resolution 217A (III) of December 10, 1948; U.N. Doc A/810 at 71 (1948)

⁵⁵ See Discussion about Article 29 (Draft Article 27) of Universal Declaration on Human Rights, November 20, 1948; U.N. Doc. A/C.3/304/REV2 as well as exemplary statement of Cuba; U.N. Doc. A/C.3/261

⁵⁶ Adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966; ICescR entered into force on January 03, 1976 and ICcpr, see footnote 23; U.N. Doc. A/RES/2200 A (XXI);

⁵⁷ Among others see General Comment 12 (food), 14 (health) and 15 (water) by the Committee on ICescR and General Comment 24 and 26 by the Human Rights Committee under ICcpr; U.N. Doc. HRI/Gen.1/Rev.5

⁵⁸ Preamble Paragraph 11 1st OP (Child Soldiers) expresses its concerns about the power and influence of armed groups and Article 4 1st OP (Child Soldiers) state that non-state actors “should” respect the human

c Prohibition of Torture

The U.S. is a contractual party to the Convention against Torture which is monitored by a body of experts chosen by the States' parties to assist the States' parties to implement their obligations under the convention. The convention defines 'torture' as "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person [...]*It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions [...]."⁶⁰ Although this Committee has not the force of a court to insist on the States to implement it, but they can bring out public reports, they can make commentaries and statements which in effect places pressure on the States. In extraordinary situations, such as the inhuman treatment in Abu Ghraib, the Committee can also break with its previously selected review countries and instead deal with special cases. Although the Committee has the right to investigate the claims against the U.S. and other occupying powers it can only indirectly address torture committed by employees of military and security corporations.⁶¹ The conduct of a non-state actor is still not seen as a human rights violation itself.

d International Criminal Law (ICC)

The adoption and the creation of the International Criminal Court by the Statute of Rome established international jurisdiction for crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. The International Criminal Court has the authority to prosecute an individual who is a national of any state that has ratified the Statue of Rome and

rights of children under 18 within their recruitment. (Adopted and opened for signature, ratification and accession by General Assembly resolution 54/263 of 25 May 2000 entered into force on 18 January 2002), U.N. Doc. A/RES/54/263

⁵⁹ Preamble Paragraph 3 and 4 2nd OP (child pornography) are concerned as well as aware of the problem and need for international regulation as reaction of power and influence by private actors. Article 2 lit. (b) 2nd OP (child pornography) addresses groups and persons and Article 3 Para. 4 and 7: sets up the obligation for compensation and putative payments. (Adopted and opened for signature, ratification and accession by General Assembly resolution 54/263 of 25 May 2000 entered into force on 18 January 2002), U.N. Doc. A/RES/54/263

⁶⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 39/46 of December 10, 1984 and entered into force on June 26, 1987, U.N. Doc. A/ES/39/46

⁶¹ Deutsche Welle: UN Committee Could Investigate US, Britain, May 08, 2004 (available at <http://www.globalpolicy.org/security/issues/iraq/attack/law/2004/0508uncommittee.htm>)

is unable or unwilling to prosecute such crimes on the national level. The court may also prosecute an individual who commits such a crime on the territory of a state that has ratified the statute, regardless of whether that individual is a national of any member state of the International Criminal Court.⁶² Neither the U.S., nor Iraq has ratified the Statue of Rome. Therefore, any discussion about its jurisdiction with regard to Abu Ghraib is highly hypothetical. Furthermore, there will be no jurisdiction over legal entities, such as military or security corporations, under the Statue of Rome.

But even in a case where an employee of a military corporation involved in war crimes would be transferred by a member state that accepts the jurisdiction of the International Criminal Court, the American Serviceman Protection Act would authorize the use of military force to liberate any American or citizen of a U.S.-allied country being held by the court.⁶³ The so called 'Hague invasion clause' has caused a strong reaction from U.S. allies around the world, particularly in the Netherlands, but nevertheless it will block any cooperation within the worldwide fight against corporate impunity.

The U.S. is also lobbying worldwide to enter into bilateral agreements with countries that would exempt U.S. citizens from the court's jurisdiction. Thereby the U.S. is not only actively undermining the authority of the newly-established International Criminal Court, but also closing the last gap in the door of the court's jurisdiction.

Finally, the United Nations has granted impunity to the U.S. within U.N. Security Council Resolution 1422 in July 2002⁶⁴, and its renewal as Resolution 1487 in June 2003.⁶⁵ With these Resolutions the United Nations requests that the International Criminal Court not proceed with investigations or prosecutions of individuals participating in U.N. peacekeeping or authorized missions who are from countries that have not yet ratified the Statute of Rome. Since the U.N. Security Council approved the engagement of the Coalition Forces in Iraq by Resolution 1483 of May 2003⁶⁶, any activities in Iraq are covered by this general impunity until June 2004. The discussion about a further extension of this general absolution started in May 2004. Fortunately, the international community was outraged by the Abu Ghraib scandal

⁶² Rome Statute of the International Criminal Court (adopted on July 17, 1998 and entered into force on July 2, 2002); U.N. Doc. U.N. Doc. A/CONF.183/9

⁶³ American Servicemembers' Protection Act of 2002, signed into force by U.S. President on August 2, 2002

⁶⁴ U.N. Doc S/RES/1422 (2002) of July 12, 2002

⁶⁵ U.N. Doc S/RES/1487 (2003) of June 12, 2003

⁶⁶ U.N. Doc. S/RES/1483 (2003) of May 22, 2003

and an outcry after first attempts by the U.S. to renew this general privilege caused a fall back by the U.S. as well as a failure to renew that resolution.⁶⁷

IV Need for Reform – Call for Regulation

As shown in the chapters before, none of the classical provision of human rights law is applicable if military and security forces are acting with generally granted impunity in Iraq and partially granted impunity for human rights abuses in the U.S. The States' obligation to protect human rights from abuses by corporations is not in question because the U.S, as occupying power, is bound to human rights. But the issue is how military corporations – acting in a legal grey zone that becomes actually a legal free zone – are obliged to obey these international standards directly. In order to fill the gap and close the loophole for corporations, international human rights law has to be defined from the perspective of victims and vulnerable groups. If there is a lack of justice and compensation for human rights violations, international law has to fill this gap and legal theories have to be employed as a basis for these new approaches.

1 Failure of market forces requires mandatory system

One of the theories that can be employed is the normative approach of direct human rights responsibilities for corporations. By this, human rights are universal, indivisible and indispensable whilst also constituting standards which protect victims and vulnerable groups. **The idea of normative human rights obligations for corporations is in collision with the neo-Liberal theory of a free market, whose prescription is that the only obligation for business is to make profit.**⁶⁸ In other words: everything that has a market value will be balanced by the invisible hand of the market. But the market value of military and security corporations is in direct opposition to human rights such as the right to life, the outlaw of torture and general human dignity. In cases where business' performance lies outside the market forces, national regulation, international guidance or voluntary codes of conduct (which address corporate social or ethical accountability), they are able to ensure compliance with human rights standards.

⁶⁷ Coalition for the International Criminal Court: Global Support for the International Criminal Court Reaffirmed, Media Advisory - June 23, 2004 (New York)

Normative Standards about corporations' direct obligations have no mechanism to implement these principles directly, still a detour via states is needed. Therefore, a direct engagement with corporations was needed. Starting from the attempt to construct a *New International Economic Order*,⁶⁹ corporate conduct was firstly framed as a direct obligation within the human rights protection mechanism of the United Nations in the late 1980's by the *Commission on Transnational Corporations*. Based on the voluntary approach, the developed *Code of Conduct* was never adopted.⁷⁰ While the universal approach of the United Nations failed, other voluntary standards were developed within other regimes. Among others these voluntary standards of corporate behaviour are the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*⁷¹ and the *Declaration on Fundamental Principles and Rights at Work*⁷² of the International Labour Organization, the *Guidelines for Multinational Enterprises* of the Organization for Economic Cooperation and Development⁷³, the *Global Compact* of the United Nations⁷⁴ or the Initiative by the European Parliament on *Corporate Social Responsibility* of the European Union.⁷⁵

But the above mentioned awareness of increased corporate power led to the revival of the attempts to engage business directly into human rights protection. In 1994 the Sub-Commission requested the Secretary General to prepare a background document examining the relationship between the enjoyment of human rights, in particular, international labour and

⁶⁸ Friedman, Milton: *Capitalism and Freedom*, Chicago 1962, page 12

⁶⁹ The notion about a *New International Economic Order* goes back on an initiative at a meeting of the Non-Allied-Movement in Algier 1973 that led to a special sitting of the UN General Assembly in 1974 which adopted on May 01, 1974 the *Declaration* (U.N. Doc. A/RES/3201 (S-VI)) and the *Programme of Action for the establishment of a New International Economic Order*, U.N. Doc. A/RES/3202 (S-VI). The General Assembly adopted on December 12, 1974 the related *Charter of Economic Rights and Duties of States*, U.N. Doc. A/RES/3281 (XXIX). The aim of the *New International Economic Order* was the evaluation, restructuring of the international trade and development regime. See. Cox, R.: *Ideologies of the New International Economic Order: Reflections on Some Recent Literature*, in: *International Organization*, 33 (2), p. 257-302

⁷⁰ Draft Code of Conduct on Transnational Corporations, Annex to letter dated May 31, 1990 from the Chairman of the reconvened special session of the Commission on Transnational Corporations to the President of the Economic and Social Council, U.N. Doc. E/1990/94

⁷¹ International Labour Organisation: *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, adopted November 16, 1977, 17 ILM 422 (1978) and revised by November 17, 2000, 41 ILM 186 (2002), available at www.ilo.org; Para. 2: "*The aim of this Tripartite Declaration of the Principles is to encourage the positive contribution which multinational enterprises can make ...*"

⁷² International Labour Organisation: *Fundamental Principles and Rights at Work and its Follow Up*, adopted June 18, 1998, available at www.ilo.org

⁷³ Organisation for Economic Co-operation and Development: *Guidelines for Multinational Enterprises*, adopted June 21, 1976, 15 ILM 967 (1976), and revised on June 27, 2000, 40 ILM 237 (2001), available at www.oecd.org; See for voluntary nature: Article 1 (Preface) of *The OECD Guidelines for Multinational Enterprises*, in: *OECD: OECD Guidelines for Multinational Enterprises, Global Instruments for Corporate Responsibility*, Annual Report 2001, Paris 2001, page 127f. (127)

⁷⁴ Issued by Secretary-General Kofi Annan in his address at the World Economic Forum in Davos (Switzerland) on January 31, 1999, U.N. Doc. SG/SM/6448 (1999)

trade union rights, and the working methods and activities of transnational corporations.⁷⁶ The Commission did not transmit the documents nor did it establish a working group. Therefore, in 1997, the Sub-Commission entrusted one of its members with the preparation of another background document, which was submitted in 1998.⁷⁷ In 1998 the Sub-Commission decided to establish its own working group for the period of three years⁷⁸ whose mandate was renewed in 2001.⁷⁹ The mandate of the Sub-Commission working group was to examine, receive and gather information, to compile a list of the various relevant instruments and norms concerning human rights and international cooperation that are applicable to transnational corporations as well as to contribute to the drafting of such relevant norms. They were to analyse the possibility of establishing a monitoring mechanism in order to apply sanctions and obtain compensation for infringements committed, and damage caused by, transnational corporations; to contribute to the drafting of binding norms for that purpose; and finally, to consider the scope of the obligation of states to regulate the activities of transnational corporations.

But what happened in Abu Ghraib and is still happening elsewhere occurs beside existing codes of conducts and new attempts within the United Nations to address business' impact on human rights. Obviously shareholder interests in profit are stronger than shareholder interests in better human rights environment. Structural deficits are causing the failure of the voluntary approach. Firstly, voluntary guidelines usually lack any implication and independent monitoring. Secondly, codes of conducts determine corporate behaviour only if business partners are keen about their observation, which in Iraq is clearly not the case. Thirdly, there are newcomers in the business that have no internal rules at all. Therefore, a mandatory, normative system of human rights protection is required. In line with this demand are discussions about a treaty-based formulation of human rights obligations of private military corporation,⁸⁰ or a more general regulation within existing human rights protection mechanisms. Also, general normative standards have a beneficiary potential for business too;

⁷⁵ European Commission: Green Paper – Promoting a European Framework for Corporate Social Responsibility, EU Doc. COM (2001)366, final of July 18, 2000, available at www.europa.eu.int

⁷⁶ Article 8 lit. c of Sub-Commission Resolution 1994/37 “Measures towards the full realization of economic, social and cultural rights” adopted on August 26, 1994, U.N. Doc. E/CN.4/Sub.2/RES/1994/37

⁷⁷ See Para. 3 of Sub-Commission Resolution 1997/39 of August 22, 1997, U.N. Doc. E/CN.4/Sub.2/RES/1996/39 and Working document “Impact of the activities of transnational corporations on the realization of economic, social and cultural rights” prepared by Mr. El Hadji Guissé, U.N. Doc. E/CN.4/Sub.2/1998/6

⁷⁸ Sub-Commission Resolution 1998/8 of August 20, 1998, U.N. Doc. E/CN.4/Sub.2/RES/1998/8

⁷⁹ Sub-Commission Resolution 2001/3 of August 15, 2001, U.N. Doc. E/CN.4/Sub.2/RES/2001/3

⁸⁰ Proposal by Kofi Annan in his “Millennium Report” (Paragraph 212), U.N. Doc. A/54/2000

military corporations start to request standards for competition on equal footing, in order that human rights abuses do not constitute a competitive advantage.⁸¹

Finally, a common normative standard of human rights obligations would provide a general legal framework, which would shape national legislation and international dispute settlements. This would leave the enforcement of human rights standards to the individual and civil society, organised in NGOs, instead of relocating the power to enforce obligations in the hands of states and international organisations, which would cause selectivity, contrary to the universal claim of human rights.

2 Increasing role of non-State actors as threat to human rights

Another theory that can be utilized in order to argue for direct human rights obligations towards military and security corporations is the one of institutionalism. Here human rights standards are also a result of a wider discourse about human rights obligations and protection. In this regard the United Nations Commission on Human Rights already expressed its concerns about the growing impact of non-State actors on human rights and stressed in particular the need to address human rights abuses by others instead of public officials in order to combat impunity.⁸² In addition, the Commission agreed that without the emerging concept of the responsibility of non-state actors, it would be incongruous to deny the victims of human rights abuses by non-state actors the rights and remedies available to other victims of human rights violations through public officials.⁸³

As a theoretical background for the approach to take conduct of private corporations into general human rights consideration, the position might be applied that the differentiation between private and public is an artificial separation of accountabilities for exercised power. International law has always, beside its function as *ius gentium*, *law of nations* or *droit des*

⁸¹ Evans, Stephen: Privatized Wars 'Need New Laws', at BBC May 10, 2004 (available at <http://www.globalpolicy.org/intljustice/general/2004/0510private.htm>)

⁸² See among others: Para. 30f. and 170 lit (d) of Report "Intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", submitted by Bernard Kessedjian, Chairperson-Rapporteur, U.N. Doc. E/CN.4/2004/59, and oral presentation on April 02, 2004, United Nations Meetings Coverage (Information Service) U.N. Doc HR/CN/04/31; Finally, Para. 32 of Report on Extrajudicial, summary or arbitrary executions submitted by Asma Jahangir, Special Rapporteur, U.N. Doc. E/CN.4/2004/7

⁸³ Comment 4 of Explanatory comments, see footnote 44 and Para 13. of Report "Second Consultative meeting on the Basic Principles and Guidelines on the right to a remedy and reparation for victims of violations of International Human Rights and Humanitarian Law (Geneva, October 20, 21 and 23)", submitted by Alejandro Salinas, Chairperson-Rapporteur, U.N. Doc. E/CN.4/2004/57

gens, set standards for the relationship between states and private persons as well as for non-state actors among themselves. Both subjects, private and public, are undergoing a change within the globalization process that has to be addressed by international law.⁸⁴

Finally, the market itself is open to considerate human rights and ethical behaviour with market value, since human rights activism and corporate self-restriction led to codes of conduct and *corporate social responsibility*.

3 Concept of shared responsibility

Further arguments that promote the idea of human rights obligations of corporations can be found in the general concept of responsibilities for international wrongful acts. From this notion accountability has to be differentiated, which is seen as the general concept of norms-based power control. Responsibility is defined as the procedural implementation of obligations within the body of international law. With regard to human rights the concept of “shared and partial responsibility”⁸⁵ that addresses all possible threats to a human right has to be introduced. Within this notion, “*primary responsibility*” lies within the hands of states, but corporations have “*responsibility within their respective spheres of activity and influence*”.⁸⁶ This concept was deepened by the *United Nations Sub-Commission on the Promotion and Protection of Human Rights* which, in August 2003, adopted the so called “*Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.*” The Sub-Commission is the U.N. think tank, consisting of independent experts, whose mandate under the Charter of the United Nations is to make recommendations or to identify areas for further development of international law for better human rights protection.⁸⁷ In its recently closed 60th session, the Commission on Human Rights confirmed “[*the*] importance and priority it accords to the question of the responsibilities of

⁸⁴ See Clapham, Andrew: *Human rights in the private sphere*, Clarendon Press, Oxford 1993, page 137f.

⁸⁵ This concept has its expression in the formulation of „prime responsibility” such as in Article 2 Para. 1 of “Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms” adopted by General Assembly Resolution 53/144 of December 09, 1998: “[*Each*] State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedom [...]” but “[*No*] one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms [...]”, U.N. Doc. A/RES/53/144 (Annex) as well as in Preamble Paragraph 4 of Optional Protocol to Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 57/199 on December 18, 2002 and available for signature, ratification and accession as from February 4, 2003, U.N. Doc. A/RES/57/199

⁸⁶ Para. 1., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2

⁸⁷ Article 13 lit. (a), Article 62, Para. 2 Charta of the United Nations (adopted on June 26, 1945 and entered into force on October 24, 1945) 557 U.N.T.S 143

transnational corporations and related business enterprises to human rights.”⁸⁸ Nevertheless the concept of shared responsibilities should **not** mean that the state is dismissed from its primary responsibilities, but that where a state is not existing or able or willing to regulate business, then corporations should become directly responsible for their conduct.

4 A new glance of Sovereignty

The above mentioned theories have in addition a solid grounding in the notions about sovereignty as the core concept of International Law. It can be described as entailing a monopoly over fundamental political decisions, as well as over legislative, executive, and juridical powers, based on consolidated, durable institutional, organized economic and financial means.⁸⁹ **In cases of absence of governmental power, rule of law and political accountability, such as in Export Processing Zones or failed states, corporations are able to exercise *de facto* sovereignty, either through collaboration with armed forces or by exercising overwhelming economic power. In this regard the new direct obligation for corporations to comply with international human rights standards, will be a clarification of the responsibility already outlined by the General Assembly that:**

[the] conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.⁹⁰

Human rights protection calls for the authority of a state and its accountability. Setting a normative standard of human rights obligations on corporations requires first of all a state, sovereign to act and regulate corporate conduct. If entities with de-facto governmental power, such as corporations in certain circumstances, fail to exercise this power they should be responsible in the same way as states are. By taking the norms as a tool to identify these circumstances they might become a source for reinforcement and protection of sovereignty. One of the notions about sovereignty is that, in order to be legitimate, the use of power has to be shaped by a system of accountabilities. In cases where corporations, either through collaboration with armed forces or by exercising overwhelming economic power, exercise direct administrative and executive power, this power causes responsibility. Thus human

⁸⁸ Lit. a) of Commission Decision 2004/116 of April 20, 2004; adopted as orally amended Draft Decision E/CN.4/2004/L.73/Rev.1 without a vote, U.N. Doc. E/CN.4/2004/L.11/Add.1, p. 81f.

⁸⁹ Brownlie, Ian: Principles of Public International Law, 4th Edition 1990, Clarendon Press Oxford, page. 78

rights obligations placed on business in general and military corporations in particular are a result of their increasing economic and political power, which can be seen as part of sovereignty.

5 New perspective to hard law and soft law

The last idea that accomplishes the normative standard of corporate responsibilities with a theoretical background is a new perspective to soft law. In order to solve the dilemma between existing business' human rights obligations and their lacking implementation as responsibilities under procedural international law, a repeal of the theoretical dichotomy between soft law and hard law will be suggested.

Soft law is artificially differentiated from binding “*hard law*” principles as “law in development” or law that comes into effect in a non-formalized way.⁹¹ But the notion of soft law was mainly introduced to differentiate law developments of less binding character from sources of international law, as described in Article 38 of the Statute International Court of Justice. Hard law is therefore developed by the formal processes that lead for instance to a treaty law obligation. But very often hard law is kept in general terms in order to make it agreeable in a procedural way.⁹² Although there are hard law obligations addressing the conduct of non-state actors, in armed conflicts, these obligations are only guided with blurred provisions for implementation at the national level.⁹³

Finally, the new perspective on soft law as law in progress, as well as normative standards, can resolve the lacking implementation mechanism on the international level. Soft law is principles of less formal legal security that might be implemented separate from their legal setting throughout political, social and economic obedience. In addition, the legal standing of soft law can increase by its development into hard law, but as principles of less formal legal

⁹⁰ Article 9 of Principles of Responsibility of States for internationally wrongful acts state responsibility (adopted by General Assembly Resolution 56/83 on December 12, 2001) U.N. Doc. A/RES/56/83 (Annex)

⁹¹ See among others for the discussion: Lubbers, Ruud: Definition of Soft Law (<http://globalize.kub.nl/lexicon.asp?term=Soft%20Law> – 2003-08-07) and Hillenberg, Hartmut: A Fresh Look at Soft Law, *European Journal of International Law*, Vol. 10, No. 3, page 499-516

⁹² See for instance general principles of human rights treaties as well as Article 204, Para. 1 and Article 217 Para. 2 United Nations Convention on the Law of the Sea (entered into force: November 16, 1994) with only programmatic importance.

⁹³ Preamble Paragraph 11 1st OP (Child Soldiers) expresses its concerns about the power and influence of armed groups and Article 4 1st OP (Child Soldiers) state that non-state actors “should” respect the human rights of children under 18 within their recruitment. (Adopted and opened for signature, ratification and accession by General Assembly resolution 54/263 of 25 May 2000 entered into force on 18 January 2002), U.N. Doc. A/RES/54/263

security.⁹⁴ Soft law is very often principles of international relations that are more specific than general terms of hard law and nevertheless binding and in practice obeyed.⁹⁵ Since corporate conduct becomes an issue in different means of law and moral enforcement, the binding character of corporate responsibility becomes visible.

The applied notion is that because of their normative demand, human rights principles such as the direct human rights obligations of corporations should recognize the hybrid character of human rights obligations as legal, political and as moral imperatives. Under this consideration it would be misleading to judge these obligations only as non-binding soft law. Business' obligations are able to develop their own system of obligations by their use and reference to it and by this they have an independent political and moral standing and the potential for an independent legal standing too.

V Outlook

The recent discovered cases of human rights abuses, such as torture, by military and security corporations are just examples of a general growing role of business in international relations. After the U.S. unilaterally declared war as kind of international politics with other means, the role of business in wars became the privatization of human rights abuses, accomplished with impunity. The schism between profit and accountability has to be overruled by internationally-agreed-upon human rights standards to be incorporated in a system of corporate responsibility. Corporate responsibility, alongside States' primary responsibility and individual responsibility makes business directly accountable for human rights abuses on a national level and according to international standards. The domestic jurisdiction of these normative standards should be guided by international advice and in absence of national implementation or factual impunity, corporations should have responsibility for their human rights obligations on the international level. **Means for greater monitoring and implementation have still to be developed, but the definition of direct obligations is a first step which could be implemented by states via regulation; by international**

⁹⁴ See among others for the discussion: Lubbers, Ruud: Definition of Soft Law (available at <http://globalize.kub.nl/lexicon.asp?term=Soft%20Law> – 2003-08-07) and Hillenberg, Hartmut: A Fresh Look at Soft Law, *European Journal of International Law*, Vol. 10, No. 3, page 499-516

⁹⁵ Examples are: The „Oral London Gentlemen's Agreement“ on geographical composition of non-permanent members of the Security Council until Charta reform of 1966 (now Article 23, Para. 1, Sentence 3 Charta); The regional rotation for the candidates for the Secretary General; The Ad-hoc Tribunals for Former Yugoslavia and Rwanda by the Security Council.

organisations via monitoring and advice; by NGOs as independent watch-dogs and by business itself via codes of conduct that guide internal and external relations.